(20,713.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 311.

DENNIS W. MULLAN, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1908.

1 I.—*Petition.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

The original petition of the claimant was filed March 13, 1902. Subsequently, to wit, on July 7, 1902, in lieu of said original petition, and by leave of Court, the claimant filed the following:

Amended Petition.

The claimant respectfully shows to the court:

(1) That he is a citizen of the United States, a resident of the city of Annapolis, State of Maryland, and that he is a Commander on the retired list of the United States Navy.

(2) In the month of February, 1897, while claimant was Commandant at the Navy Yard at Pensacola, Florida, certain allegations of drunkenness were made against him to the Navy Department. To have an opportunity of refuting these allegations, claimant requested the Navy Department to refer them to a Court of Inquiry, and in accordance with this request, that Department ordered a Court of Inquiry to be convened at the Navy Yard, Pensacola, Florida, to investigate said allegations. This Court, consisting of a single Officer, convened at the Pensacola Navy Yard, Florida, on March 25, 1897, and upon completing its investigations submitted to the Navy Department the Record of its proceedings and findings.

(3) A copy of these findings was sent on May 15, 1897, to the claimant by the Navy Department, and in its letter transmitting the same the approval thereof by the Navy Department was also communicated to him. Upon their receipt, the claimant wrote a letter to the Navy Department on May 19, 1897, wherein, stating
2 the great consequence to him that these findings should be passed upon by the highest tribunal known to military law, he requested that a Court Martial be ordered to convene to try the same, a copy of which letter is attached to this Petition as claimant's Exhibit "A" and made a part thereof.

(4) Replying to this request, the Navy Department wrote a letter to the claimant on May 25, 1897, in which it stated, "That after "carefully considering the matter, the Department has decided, in "view of the difficulty of assembling a Court composed, as it should "be, of your seniors at so distant a station as Pensacola, and of col-"lecting all the witnesses at a more convenient point, that it will "convene a General Court Martial at the Navy Yard, Washington, "for your trial upon such portions of the findings of the Court of "Inquiry as it deems proper to charge against you (See Article

"1778, U. S. Navy Regulations, 1896), provided that the record "of such Court of Inquiry be accepted as evidence."

A copy of this letter is attached hereto as claimant's Exhibit "B" and made a part hereof.

(5) Notwithstanding claimant knew that the Secretary of the Navy of his own motion could not use before a Court Martial the record of the proceedings of said Court of Inquiry, except within certain limitations prescribed by statute, yet because of the seriousness to him—he then standing No. 2 on the active list of Commanders of the Navy, subject to an early examination for promotion to the grade of Captain—that these charges should be at once further investigated before a proper tribunal, the claimant having on June 8, 1897, been denied by the Navy Department the right to recall any of the witnesses who gave testimony before said Court of Inquiry, was compelled under this condition of *quasi duress* to accede to said decision of the Navy Department of June 8, 1897. The letters of June 2, June 8, and June 9, 1897, that passed between the Navy Department and claimant, whereby an agreement was reached, are attached hereto as claimant's Exhibits "C," "D,"
3 and "E" and made parts hereof. In making the said agreement the claimant did not consent that the record of the proceedings of said Court of Inquiry should, as evidence, be made the basis of a sentence by said Court Martial of his dismissal from the Navy. That such a sentence based upon such evidence is expressly prohibited by Article 60, Section 1624 of the Revised Statutes of the United States, and though the agreement between the Navy Department and claimant did not contain any express provision as to the character of sentence that might be rendered against him by a Court Martial, yet he did not then and does not now consider that his right to rely upon said Article 60 as a bar to a judgment of dismissal, was a right which he might or could waive, or which the Navy Department could call upon him to waive, and which in fact he did not waive. And this claimant further submits, that if he was to be tried by Court Martial at all, that when tried that it was his right, guaranteed him by Section 2, Article III, of the Constitution, to have been tried by a Naval Court to be convened at the Naval Station at Pensacola, State of Florida, where the offenses for which he was tried were alleged to have been committed, and by Article 6, Amendment to the Constitution, to be there confronted with the witnesses against him. These were rights which could not properly or legally be denied him; rights which he could not properly or legally waive, but that under a condition of *quasi duress*, he was compelled to accede to the terms of the decision of the Navy Department of May 25, 1897 (recited as Exhibit B in this Petition) and to submit to a trial before a Naval Court at the Navy Yard, Washington, D. C.; wherefore this claimant submits that all the proceedings of said Court Martial, which convened, sat, and tried him at the Navy Yard, Washington, D. C., were void *ab initio* and that said court, which sat and tried him without witnesses at the Navy Yard at Washington, D. C., for offenses alleged to have been committed by him at Pensacola, State of Florida,

and at the Navy Yard at said place, was utterly without jurisdiction to try and dismiss him from the United States Navy.

4 (6) At the Court Martial convened at the Navy Yard at Washington, D. C., on June 15, 1897, in pursuance of the above agreement, the record of the proceedings of said Court of Inquiry, in so far as the same related to the charges before said Court Martial, and testimony taken before said Court of Inquiry, were used in evidence, and in fact constituted the sole evidence upon which said Court Martial acted, except that as to one specification of the charges, where the prosecution introduced the testimony of Paymaster-General Stewart, U. S. N., which, considered as a whole, is not unfavorable to the claimant, and certainly could not have been made a basis for conviction on that charge.

(7) Upon the evidence before it the Court Martial found the claimant guilty of charges alleged, and sentenced him to be dismissed from the Navy. The sentence was approved by the Navy Department on the 30th day of June, 1897, and submitted to the President on the 30th day of June, 1897, with the recommendation that the sentence be confirmed. The President on the 8th day of July, 1897, issued the following Order:

"EXECUTIVE MANSION, *July* 8, 1897.

"The sentence in the foregoing case of Commander Dennis W. "Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To "be reduced in rank so that his name shall be placed at the foot of "the list of Commanders in the Navy, and to be suspended from "rank and duty, on one-half sea pay, for a period of five years, dur- "ing which time he shall retain his place at the foot of said list.

"WILLIAM McKINLEY."

(8) The said Court Martial by receiving and accepting in evidence the record of the proceedings of said Court of Inquiry and using the testimony adduced thereat, which (under Article 60, Section 1624 of the Revised Statutes of the United States), could not be legally used in any case extending to the dismissal of a commissioned officer, exceeded its legal authority, limited as it was by Article 60, Section 1624 of the Revised Statutes of the United States, said

5 record of said Court of Inquiry having been admitted and used as evidence before the said Court Martial, said Court thereby became prohibited from inflicting upon claimant a sentence of dismissal from the Navy of the United States, and the judgment of said Court Martial was for this reason void, and all subsequent proceedings based thereon were also void; and the Order of the President above set forth, upon which claimant's pay was reduced, as is heinafter set forth, was also void and ineffective because of the foregoing reason, and also for the further reason that said order is contrary to the provisions of Article 54, of Section 1624 of the Revised Statutes of the United States, being an Order which commuted but did not remit or mitigate the sentence of said Court Martial.

(9) In accordance with said Order of the President, the claimant was paid between July 8, 1897, and June 30, 1899, at the rate of

$1,750 per year, being one-half of the sea pay of his grade under Section 1556 of the Revised Statutes, and between July 1, 1899, and July 11, 1901, at the rate of $2,000 per year, being one-half of his sea pay under the Naval Personnel Act of March 3, 1899. On July 11, 1901, the unexpired portion of his said sentence was remitted by the President, and the claimant was restored to duty.

(10) The claimant was entitled to receive between July 8, 1897, and June 30, 1899, pay at the rate of $2,300 per year, being the amount fixed by Section 1556 of the Revised Statutes as the pay of a Commander on waiting orders, and he was entitled to receive between July 1, 1899, and July 11, 1901, pay at the rate of $3,400 per year, being the minimum pay due him under the Personnel Act, thus making now due the claimant $1,142.10 for the period between July 8, 1897, and June 30, 1899, and $2,827.80 for the period between July 1, 1899, and July 11, 1901.

(11) That claimant has not received any pay or compensation for the periods mentioned above other than that stated; that he is the sole owner of this claim and the only person interested
6 therein, and has made no assignments thereof or of any interest therein.

Wherefore claimant prays that he may have judgment against the United States for the sum of three thousand nine hundred and sixty-nine and 90-100 dollars ($3,969.90).

DENNIS W. MULLAN.

RALSTON & SIDDONS,
Attorneys for Claimants.

STATE OF MARYLAND, *County of Anne Arundel, ss:*

Dennis W. Mullan, being first duly sworn, on oath deposes and says that he is the person named in the foregoing petition, and the subscriber thereto; that he has read the same and knows the contents thereof, and that the facts therein stated upon knowledge are true, and that those stated as upon information and belief he is informed and believes to be true.

DENNIS W. MULLAN.

Witnesses:
J. ROLAND BRADY.
NICHOLAS W. BRYAN.
GEO. L. PENDLETON.

Subscribed and sworn to before me this thirtieth day of June, A. D. 1902.

J. ROLAND BRADY,
Notary Public.

EXHIBIT "A."

1420 F STREET,
WASHINGTON, D. C., *May* 19, 1897.

Hon. John D. Long, Secretary of the Navy.

SIR: Having received from you, on the 15th inst., a copy of the findings of fact submitted to you by the Court of Inquiry
7 which was ordered at my request, and which met at the Pensacola Navy Yard on March 25th last and your approval of the same; and having considered the memorandum signed by the Judge-Advocate General, I respectfully request that a Court Martial be ordered to try such charges as may be formulated from the findings of the Court of Inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a Naval Court having full judicial powers.

The findings of the Court of Inquiry and your approval of them being part of the record of my naval service render it a matter of great consequence to me that whatever statement in this record may be detrimental to my record as an officer should be investigated and passed upon by the highest tribunal known to military law.

Very respectfully,

(Signed) D. W. MULLAN,
Commander, U. S. Navy.

EXHIBIT "B."

NAVY DEPARTMENT,
WASHINGTON, *May* 25, 1897.

SIR: The Department has received and considered your communication of the 19th instant, in which you request that a Court Martial be ordered to try such charges as may be formulated from the findings of the Court of Inquiry recently in session at the Navy Yard, Pensacola, Fla.

In reply you are informed that, after carefully considering the matter, the Department has decided, in view of the difficulty of assembling a Court composed, as it should be, of your seniors at so distant a station as Pensacola, and of collecting all the witnesses at a more convenient point, that it will convene a General Court Martial at the Navy Yard, Washington, for your trial upon such portions of the findings of the Court of Inquiry as it deems proper to
8 charge against you (See Article 1778, U. S. Navy Regulations 1896), provided that the record of such Court of Inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.

You will acknowledge the receipt of this communication and state whether or not you accede to the foregoing proposition.

Very respectfully,

(Signed) JOHN D. LONG, *Secretary.*

Commander Dennis W. Mullan, U. S. Navy, care Messrs. McCammon & Hayden, 1420 F Street, N. W., Washington, D. C.

EXHIBIT "C."

1420 F STREET,
WASHINGTON, D. C., *June* 2, 1897.

SIR: I have the honor to acknowledge the receipt of your letter of the 25th inst., relative to my request for a Court Martial, stating that the Department will convene a General Court Martial at the Navy Yard at Washington for my trial, etc., "provided that the record of such Court of Inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence." You desire me to state whether or not I accede to the foregoing proposition. In reply I beg to say that I will agree that the testimony taken before the Court of Inquiry may be accepted by the Court Martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and my counsel, but also to such other legal objections as may be made to such testimony before the Court Martial; and it is to be understood
9 that the right of "each of the parties to the trial to have the privilege of introducing other evidence" shall include the right of each of the parties to recall any of the witnesses who gave testimony before the Court of Inquiry, and also the right to take testimony by written interrogatories and cross-interrogatories. It is to be further understood that so much of the record of the Court of Inquiry as contains its findings of fact and the action of the Secretary thereon, and the memorandum of the Judge Advocate General, shall be excluded, and shall not be sent to nor considered by the Court Martial.

Believing that these suggestions of mine are within the general scope of your proposition, and are necessary to my full and fair trial, I respectfully request your acquiescence in the same, in which case I shall accede to your proposition contained in the Department's letter of the 25th inst., amended as above by me.

Very respectfully,
(Signed) D. W. MULLAN,
Commander, U. S. N.

EXHIBIT "D."

NAVY DEPARTMENT,
WASHINGTON, *June* 8, 1897.

SIR: In reply to your communication of the 2d instant, you are informed as follows:

1. Referring to your statement that you will agree that the testimony taken before the Court of Inquiry may be accepted by the Court Martial, subject not only to the legal objections made to the questions propounded by both the judge advocate and your counsel, but also to such other objections as may be made to such testimony before the Court Martial should one be ordered, I have to state that these are matters for determination of such Court.

2. Your request that each of the parties shall have the right to recall any of the witnesses who gave testimony before the Court
10 of Inquiry is denied. In the brief submitted to the Department by your counsel it is stated:

* * * It is evident from the large number of witnesses and the thoroughness of the examination that it would be scarcely possible to have more evidence adduced before a Court Martial than was presented to the Court of Inquiry. * * * (p. 2.)

* * * No Court Martial or other military or civil tribunal could have been or could be more successful in eliciting all facts bearing upon Commander Mullan's conduct. * * * (p. 42.)

3. Depositions taken, as you suggest, by written interrogatories and cross-interrogatories are not admissible as evidence before Naval General Courts Martial.

4. The findings of fact by the Court of Inquiry, the action of the Department thereon, and the memorandum of the Judge Advocate General will not be sent to the Court Martial. It may be added that the printed brief of your counsel, which has become a part of the record of the case, will be similarly withheld.

You will give this letter your immediate attention, as the Department has determined that there must be a speedy end to the matter.

Very respectfully,

(Signed) JOHN D. LONG, Secretary.

Commander Dennis W. Mullan, U. S. Navy, care Messrs. McCammon & Hayden, 1420 F street, N. W., Washington, D. C.

EXHIBIT "E."

1420 F STREET,
WASHINGTON, D. C., *June* 9, 1897.

The Honorable Secretary of the Navy.

SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, and I respectfully inform
11 the Department that I accede to the conditions therein recited, and ask that a Court Martial may be ordered, as contemplated in your letter of May 25, 1897.

Very respectfully,

D. W. MULLAN,
Commander, U. S. N.

12 II.—*Traverse.*

Filed January 10, 1907.

In the Court of Claims of the United States, December Term, A. D. 1906.

No. 22822.

DENNIS W. MULLAN
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

J. A. VAN ORSDEL,
Assistant Attorney General.

13 III.—*Argument and Submission.*

On the 10th of January, 1907, this case came on to be heard, and was argued by Mr. William E. Richardson for the claimant, and by Mr. George M. Anderson for the defendants, and submitted.

14 IV.—*Findings of Fact, Conclusion of Law, and Opinion of the Court.*

Filed Feb'y 18, 1907.

DENNIS W. MULLAN
v.
THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a citizen of the United States, a resident of the city of Annapolis, State of Maryland, and a commander on the retired list of the United States Navy.

II.

From July 30, 1896, until March 7, 1897, the claimant, then holding the rank of commander, United States Navy, was serving as com-

mandant of the navy yard at Pensacola, Fla. During this period certain charges of drunkenness were preferred against him to the Navy Department. The claimant upon learning of the fact requested the Navy Department to convene a court of inquiry to investigate the same. Complying with his request, the Navy Department did, on May 25, 1897, convene a court of inquiry at the Pensacola Navy-Yard, which court took the testimony of witnesses and submitted to the Navy Department the record of its proceedings and a finding adverse to the claimant.

III.

The claimant was, at the time said adverse report was submitted by this court of inquiry, subject to early examination for promotion to the grade of captain. The provisions of law relative to examining boards require that if it shall appear that the applicant is unable by reason of drunkenness or any cause arising from his own misconduct, to perform at sea the duties of the position to which it is proposed to promote him, he shall not be placed on the retired list, but discharged, with not more than one year's pay.

IV.

15 The claimant, by letter of May 19, 1897, requested the Secretary of the Navy to order a court-martial for the purpose of trying said charges. This letter is as follows:

"1420 F STREET,
WASHINGTON, D. C., *May* 19, 1897.

"SIR: Having received from you, on the 15th instant, a copy of the findings of fact submitted to you by the court of inquiry which was ordered at my request, and which met at the Pensacola Navy-Yard on March 25 last, and your approval of the same, and having considered the memorandum signed by the Judge-Advocate General, I respectfully request that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry, so that an opportunity may be afforded to try and determine such issues of fact before a naval court having full judicial powers.

"The findings of the court of inquiry and your approval of them being part of the record of my naval service, render it a matter of great consequence to me that whatever statement in this record may be detrimental to my record as an officer should be investigated and passed upon by the highest tribunal known to military law.

"Very respectfully, D. W. MULLAN,
"Commander, United States Navy.

"Hon. John D. Long, Secretary of the Navy."

V.

May 25, 1897, the Secretary of the Navy responded to the claimant's request as follows:

"NAVY DEPARTMENT,
WASHINGTON, *May* 25, 1897.

"SIR: The Department has received and considered your communication of the 19th instant, in which you request that a court-martial be ordered to try such charges as may be formulated from the findings of the court of inquiry recently in session at the navy-yard, Pensacola, Fla.

"In reply you are informed that, after carefully considering the matter, the Department has decided, in view of the difficulty of assembling a court composed, as it should be, of your seniors at so distant a station as Pensacola, and of collecting all the witnesses at a more convenient point, that it will convene a general court-martial at the navy-yard, Washington, for your trial upon such portions of the findings of the court of inquiry as it deems proper to charge against you (see art. 1778, U. S. Navy Regulations, 1896), provided that the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.

"You will acknowledge the receipt of this communication, and state whether or not you accede to the foregoing proposition.

"Very respectfully, JOHN D. LONG, Secretary.

"Commander Dennis W. Mullan, U. S. Navy, (care Messrs. McCammon & Hayden, 1420 F street NW., Washington, D. C.)"

VI.

16 On June 2, 1897, the claimant answered as follows:

"1420 F STREET,
"WASHINGTON, D. C., *June* 2, 1897.

"SIR: I have the honor to acknowledge the receipt of your letter of the 25th instant, relative to my request for a court-martial, stating that the Department will convene a general court-martial at the navy-yard at Washington for my trial, etc., 'provided that the record of such court of inquiry be accepted as evidence in the case, each of the parties to the trial to have the privilege of introducing other evidence.' You desire me to state whether or not I accede to the foregoing proposition. In reply, I beg to say that I will agree that the testimony taken before the court of inquiry may be accepted by the court-martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and my counsel, but also to such other legal objections as may be made to such testimony before the court-martial; and it is to be understood that the right of 'each of the parties to the trial to have the privilege of introducing other evidence' shall include the right of each of the parties to recall any of the witnesses who gave testimony before the court of inquiry, and also the right to take testimony by written interrogatories and cross-interrogatories. It is to be further understood that so much of the record of the court of inquiry as contains its findings of fact and the action of the Secretary thereon, and the memo-

randum of the Judge-Advocate-General, shall be excluded, and shall not be sent to nor considered by the court-martial.

"Believing that these suggestions of mine are within the general scope of your proposition, and are necessary to my full and fair trial, I respectfully request your acquiescence in the same, in which case I shall accede to your proposition contained in the Department's letter of the 25th instant, amended as above by me.

"Very respectfully, D. W. MULLAN,
"Commander, United States Navy."

VII.

On June 8, 1897, the Secretary of the Navy replied as follows:

"NAVY DEPARTMENT,
"WASHINGTON, *June* 8, 1897.

"SIR: In reply to your communication of the 2d instant, you are informed as follows:

"1. Referring to your statement that you will agree that the testimony taken before the court of inquiry may be accepted by the court-martial, subject not only to the legal objections made to the questions propounded by both the judge-advocate and your counsel, but also to such other objections as may be made to such testimony before the court-martial, should one be ordered, I have to state that these are matters for the determination of such court.

"2. Your request that each of the parties shall have the right to recall any of the witnesses who gave testimony before the
17 court of inquiry is denied. In the brief submitted to the Department by your counsel it is stated:

"'* * * * It is evident from the large number of witnesses and the thoroughness of the examination that it would be scarcely possible to have more evidence adduced before a court-martial than was presented to the court of inquiry.'

"'* * * * No court-martial or other military or civil tribunal could have been or could be more successful in eliciting all facts bearing upon Commander Mullan's conduct. * * *'

"3. Depositions taken, as you suggest, by written interrogatories and cross-interrogatories are not admissible as evidence before naval general courts-martial.

"4. The findings of fact by the court of inquiry, the action of the Department thereon, and the memorandum of the Judge-Advocate-General will not be sent to the court-martial. It may be added that the printed brief of your counsel, which has become a part of the record of the case, will be similarly withheld.

"You will give this letter your immediate attention, as the Department has determined that there must be a speedy end to the matter.

"Very respectfully, JOHN D. LONG, *Secretary.*

"Commander Dennis W. Mullan, U. S. Navy, (care Messrs. McCammon & Hayden, 1420 F street NW., Washington, D. C.)"

VIII.

On June 9, 1897, the claimant acceded to the terms imposed by the Navy Department by the following letter:

"1420 F STREET,
WASHINGTON, D. C., *June* 9, 1897.

"SIR: I have the honor to acknowledge the receipt of your communication of the 8th instant, and I respectfully inform the Department that I accede to the conditions therein recited, and ask that a court-martial may be ordered, as contemplated in your letter of May 25, 1897.

"Very respectfully, D. W. MULLAN,
"*Commander, United States Navy.*

"The Secretary of the Navy."

IX.

In pursuance of the foregoing correspondence, a general court-martial was ordered by the Secretary of the Navy to convene at the navy-yard, Washington, D. C., to try the claimant upon certain charges and specifications.

At the convening of said court, preliminary to the introduction of evidence in the case, the Judge-Advocate presented to the court the letters between the Secretary of the Navy and the claimant, set forth in paragraphs 4 to 8, both inclusive, of the findings of fact, and the same were spread upon the record of proceedings of said court. Said court convened on June 15, 1897, and held sessions on that
18 and succeeding days, when was produced the testimony of 50 witnesses, the testimony of 49 of said witnesses having been taken before the court of inquiry above referred to, which testimony was admitted in evidence in pursuance of the agreement made between the claimant and the Secretary of the Navy and was not objected to by the claimant at the trial. The claimant was represented before the court of inquiry and before the court-martial by counsel.

X.

The only witness produced before said court-martial was Paymaster-General Edwin Stewart, U. S. Navy, who testified that he had never seen claimant take a drink, and in respect to specification 4 of charge 2, that on one occasion, at the Pensacola Navy-Yard, at a time when the claimant was charged with "drunkenness on duty"—"his conversation was coherent and his manner courteous," that witness had the impression "that he had been drinking"—"there was some slight thickness of articulation which impressed me," but "as I had never seen him take a drink in my life, I am somewhat reluctant to assert positively that he was under the influence of liquor."

XI.

Claimant was tried upon two charges of drunkenness and drunkenness on duty, each containing six specifications. Upon the evi-

dence so submitted, said court-martial found the claimant guilty of both charges as alleged and sentenced him to be dismissed from the Navy. This sentence was approved by the Secretary of the Navy on June 30, 1897, and submitted to the President, who, on July 8, 1897, issued -he following order:

"EXECUTIVE MANSION, *July* 8, 1897.

"The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list.

WILLIAM McKINLEY."

In accordance with said order the claimant was paid between July 8, 1897, and June 30, 1899, at the rate of $1,750 per year, being one-half sea pay under Revised Statutes, section 1556, and between July 1, 1899, and July 11, 1901, at the rate of $2,000 per year, being one-half sea pay under the naval personnel act of March 3, 1899. The difference between such pay and waiting orders pay for the same period is as follows:

Waiting Orders Pay.

Under Revised Statutes, United States:		
July 8, 1897, to June 30, 1898.....	$2,255.77	
July 1, 1898, to June 30, 1890.....	2,300.00	
Under Navy Personnel act:		
July 1, 1899, to June 30, 1900.....	3,400.00	
July 1, 1900, to June 30, 1901.....	3,400.00	
July 1, 1901, to July 11, 1901.....	102.41	
		$11,458.18

19 *Pay Received.*

Under Revised Statutes United States:		
July 8, 1897, to June 30, 1898.....	$1,716.35	
July 1, 1898, to June 30, 1899.....	1,750.00	
Under navy personnel act:		
July 1, 1899, to June 30, 1900.....	2,000.00	
July 1, 1900, to June 30, 1901.....	2,000.00	
July 1, 1901, to July 11, 1901.....	57.69	
		$7,524.04
Difference in pay.....		3,934.14

XII.

That the claimant, after the action of said court-martial, both before and after the approval of its finding by the President of the United States, protested against the illegality of these proceedings, as

a result of which protest on July 11, 1901, the unexpired period of his sentence was remitted by order of the President.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is not entitled to recover, and his petition is therefore dismissed.

Opinion.

BOOTH, J., delivered the opinion of the court:

Commander Mullan, the claimant herein, while serving as commandant at the navy-yard at Pensacola, Fla., learned of certain accusations of misconduct having been preferred against him to the Navy Department. Desiring to refute the same, he requested the Navy Department to refer them for investigation to a court of inquiry. Complying with his request, the Navy Department ordered a court of inquiry to be convened at the navy-yard at Pensacola, Fla., for the purpose of investigating the same. The result of the court of inquiry's investigation was a finding adverse to the claimant. Not being satisfied with the finding of the court of inquiry, claimant again appealed to the Navy Department requesting the Secretary of the Navy to convene a court-martial for an investigation of said charges. Complying with this request, the Navy Department did convene a court-martial at the navy-yard, Washington, D. C., for the purpose of trying claimant upon such parts of the findings of the court of inquiry as it deemed proper to charge against him.

The correspondence leading up to and resulting in the assembling of the court-martial is fully set out in the findings. The sentence of the court-martial was likewise adverse to the claimant, and he would thereunder have been dismissed from the Navy save for the order of the President, as set out in finding XI.

This suit is for the recovery of the difference in pay between the amount paid him after the sentence of the court-martial and the amount alleged to be due as waiting-orders pay. The case involves the legality of the court-martial.

Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they were legally constituted and had jurisdiction of the offense charged the person of the accused and complied with
20 the statutory regulations governing their proceedings. (*Dynes v. Hoover*, 20 How. 65; *Ex parte Reed*, 100 U. S., 13; *Smith v. Whitney*, 116 U. S., 167; *Johnson v. Sayre*, 158 U. S., 109; *Swaine v. United States*, 165 U. S., 553; *Carter v. McClaughry*, 103 U. S., 365; *McClaughry v. Deming*, 106 U. S., 49.)

Claimant first challenges the jurisdiction of the court-martial over the subject-matter of the offense charged, predicating the same upon the condition imposed by the Secretary of the Navy as to the admissibility of the evidence adduced before the court of inquiry as evi-

dence before the court-martial, the Secretary manifestly having refused to accede to claimant's request for a court-martial unless the admissibility of the same was previously agreed to; and upon said testimony being inadmissable before the court-martial under article 60 of section 1624, Revised Statutes; and being so could not be validated by stipulation of the parties.

Article 60, section 1624, Revised Statutes, reads as follows:

"The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge-advocate, and shall, in all cases not capital nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony can not be obtained."

It is to be observed that claimant's privilege to have the accusations made against him to the Navy Department first investigated by a court of inquiry and again investigated by a court-martial, the supreme military tribunal, was not a matter of statutory or military right. No charges had been preferred against the claimant by the Navy Department and no effort had been made or was being made by the Department to secure his dismissal from the service because of the accusations against him, so far as the record before us discloses. The Secretary of the Navy was vested with power to convene such a tribunal, but also with discretion as to convening the same. Claimant had made an appeal for the exercise of the Secretary's discretion, but he nevertheless still had the right and privilege to reject or accede to the stipulation respecting the waiver of statutory requirements as to the admissibility of testimony prior to the convening of the court-martial. The convening of the court-martial was entirely for his benefit, for unless he could acquit himself of the charges preferred he would be shortly liable under the provisions of the act of August 5, 1882, section 1447, Revised Statutes, providing for his promotion, to which he was at the time eligible, to be discharged from the service with not more than one year's pay. The Navy Department could well have rested the case upon the findings of the court of inquiry in so far as claimant's right to promotion was concerned. Moved, no doubt, by a desire to afford to the claimant every available proceeding to acquit himself of the charges preferred against him, that he might secure the benefit of the act of August 5, 1882 (*supra*), his request for a second investigation was granted. It is not contended that claimant or his counsel were ignorant of the existence of or terms of article 60, section 1624 of the Revised Statutes. The correspondence between claimant and Secretary of the Navy respecting the admissibility of this testimony indicate a full knowledge upon his part as to the statutes relating thereto.

21 During the progress of the trial the agreement was observed by claimant and his counsel and no objection entered of record to the production and consideration of said evidence by the court-martial. The question of waiver is usually one of fact. The right itself has some limitations grounded upon the doctrine of public policy. The rule, however, is well established that one may waive the advantage of a law intended for his benefit where the waiver does not affect the right of others or contravene the public good. It is as-

serted, however, with much earnestness that article 60, *supra*, being legislation for the mutual benefit of both claimant and defendants, was mandatory and not subject to waiver. The purpose of the statute was to so limit and circumscribe the proceedings of courts-martial as to secure to the accused the right to be confronted with the witnesses against him in cases extending to capital punishment and dismissal from the service the extreme penalties imposed for violation of military law. While confined within narrower limits than the rights secured to persons in civil life accused of crime under Article VI of the Federal Constitution, its intent is similar thereto, the Congress by its passage seeking to extend to the military officers of the Government accused of military offenses and subject only to the jurisdiction of military tribunals the same guarantees extended to those in civil life similarly accused, subject to trial before civil tribunals.

It is to be observed that the proceedings of a court of inquiry are not admissible under the statute in any case unless it affirmatively appears that oral testimony is unobtainable, thus securing to the accused even in minor offenses the right to exclude the findings of a court of inquiry, except in those extraordinary cases where all oral testimony as to the event has disappeared. The statute in its entirety seems to clearly indicate an intention to surround the accused with that high degree of protection whereby he may be legally assured that he will not be summarily divested of his rights under the law—a guaranty identical in most respects with that extended to civil persons in the bill of rights (Art. 6, Constitution). In *Reynolds v. United States* (98 U. S., 158, 159), a case wherein the constitutional provision respecting the right of the accused to be confronted with witnesses against him was directly involved, Chief Justice Waite, speaking for the court, uses this language:

"The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him, but if he voluntarily keeps the witnesses away he cannot insist on his privilege."

Again he says:

"So that now in the leading text-books it is laid down that if a witness is kept away by the adverse party, his testimony, taken on a former trial between the same parties upon the same issues, may be given in evidence."

True, in the case at bar the witnesses against the accused were not prevented from attending through the intervention of any wrongful act upon his part. Yet the stipulation waiving the right to insist upon their presence, if not binding, would have put the accused in the attitude of having secured the second hearing before a court-martial upon false representations. The claimant voluntarily surrendered an express provision of law the complete import of
22 which he well knew. By so doing he acquired another right not given to him by law to again present his defense to serious accusations against himself. If he is now permitted to avail himself of a defense in a civil tribunal which he might have presented to the tribunal having full jurisdiction at the time of the

hearing, he will be in effect permitted to contravene the consequences of his own voluntary act, and repudiate now an agreement which should in justice have been repudiated then, if at all. In the case of *Williams v. The State* (61 Wis., 281) the question of the right to waive a constitutional guaranty similar to that in article 6 of the Federal Constitution arose. The accused had been convicted of murder in the first degree. The evidence of a witness given before the coroner's inquest was read to the jury by the consent and stipulation of the State's attorney and the attorney for the defendant. In affirming the judgment of the trial court the Supreme Court said:

"But it is said that, as the Constitution provides that the accused shall enjoy the right to meet the witnesses face to face, he can not waive that right, and therefore the stipulation of the counsel that it might be read goes for naught. It is well settled that the accused may waive his right to be confronted with the witnesses on the trial."

In the case of *State v. Polson* (29 Iowa, 133), the court said:

"It will be observed that the right secured by this provision to the accused, to be confronted with the witnesses against him, is a personal right limited to proceedings in criminal prosecutions, or where the life or liberty of the citizen is involved. The provision is not in the nature of an inhibition upon a proceeding not in accord with the one secured. Neither is it in the nature of a jurisdictional limitation upon the authority of the court, prohibiting the exercise of power except in the manner specified. It simply secures a personal right, and in no manner affects the jurisdiction of the court when prosecutions are tried. It very clearly appears that this right in proper cases, when no wrong can be done the accused, may be by him voluntarily waived. * * * It has been expressly ruled that when a prisoner permits illegal testimony to be given to the jury without objection, he can not afterwards raise any claim of privilege on account of the admission of such evidence."

In the case of *Warren v. Glynn* (37 N. H., 340), the court said:

"Indeed the authorities are too numerous for citation, where it has been held that a party, cognizant in the earlier stages thereof, of an objection that might be fatal to the validity of a proceeding before a tribunal otherwise competent, can not be permitted to lie by and take his chances of a result in his favor, and, after one has been arrived at against him, avail himself of that objection to avoid the consequences of such adverse result."

To the same effect are sections 118 and 1205, 1 Bishop, on Criminal Procedure. Indeed, the question is too well settled to admit of further citations.

While the constitutional provision to which we have referred has no application to the proceedings of courts-martial and is applicable only to criminal prosecutions in the civil courts of the United States, its interpretation by the civil courts is nevertheless exceedingly persuasive in giving effect to a legislative enactment to accomplish a similar intent in proceedings of courts-martial.

23 On March 15, 1825, Hon. William Wirt, then Attorney-General for the United States, responding to a request from the Secretary of the Navy in reference to the legal effect of a waiver of the privileges set out in the ninety-first article of war, said:

"It is a settled rule of law that no evidence is to be given against a prisoner but in his presence. This, however, is a privilege for the benefit of the prisoner, which it is perfectly competent for him to waive; and, as I understand your letter of the 12th, it has been waived in the case therein stated, by the consent of the officer who is about to be put upon his trial, and the depositions of witnesses abroad, taken upon interrogatories and cross-interrogatories, should be used on the trial. I do not think that the point of time at which this consent was expressed will effect the competency of the testimony."

We have been unable, after a most careful and exhaustive research of the authorities, both military and civil, to discover an opinion contrary to this rule. The evidence adduced before a board of inquiry is surrounded by all the solemnities of evidence taken in a court of record or before a court-martial. The accused is personally present and represented by counsel. The right of cross-examination prevails and every legal inhibition as to its competency or relevancy can be raised at the hearing. While it is a court of inferior jurisdiction and its findings usually advisory, its proceedings are not in anywise summary. The evidence adduced and preserved before courts of inquiry is superior in every respect to depositions. An accused thus arraigned can not plead ignorance of the testimony against him or hope by subsequent examination of the same witnesses, in the same cause, between the same parties, to materially change their testimony.

We therefore conclude that the provisions of the statute governing the admissibility of the findings of the court of inquiry were not departed from by the proceedings of the court-martial.

We are unable to see how the objections now raised as to the departure from article 60, section 1624, Revised Statutes, in any manner goes to the jurisdiction of the court-martial. Were that the only question involved the case would be one of easy solution. The mere effect of the stipulation being made a matter of record at the convening of the tribunal did not preclude the claimant as a matter of right from contesting its validity at the time of the trial. In fact the correspondence relative thereto shows upon its face a submission of this question to the court-martial. The statute in question is not in any manner a limitation upon the jurisdiction of the court-martial. The authority of the tribunal is not proscribed by its terms. It is merely a legal regulation as to its proceedings securing certain rights to the accused, which in the absence of an express waiver upon his part, must be accorded him by the tribunal or subject their findings or sentence to collateral attack in civil courts, and as such we have treated it. The allegation of duress with respect to the stipulation aforesaid is without merit. There were absolutely no circumstances surrounding the execution of the instrument which even tended to limit the free agency of the accused; he was not precluded thereby from introduction of additional testimony. Finding X discloses that he did produce an additional witness, and the stipulation simply included the testimony of the witnesses upon the former hearing without any comment or the findings of the court. No rights
24 of the accused were violated in respect to the convening of the court-martial, for, as before observed, accused was not en-

titled under any law to have such a tribunal convened. It was for his express benefit that he sought to invoke its aid in an appeal to the Navy Department.

Claimant's second contention goes to the validity of the President's action in respect to the sentence imposed upon the claimant by the court-martial, it being asserted that the action of the President in issuing his order of July 8, 1897 (Finding XI), was contrary to article 54, section 1624, Revised Statutes, in that it commuted the sentence of the court-martial, whereas only power to mitigate was authorized.

Article 54, section 1624, R. S., is in these words: "Every officer who is authorized to convene a general court martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

Granting *arguendo* without deciding the correctness of the position taken, we are of the opinion that the statute in question has no application to the President.

The court-martial having been legally constituted and having had jurisdiction of the subject-matter charged, and the person of the accused and its proceedings and sentence having complied with all statutory regulations governing the same, the petition herein will be dismissed.

Petition is dismissed.

BY THE COURT.

25 V.—*Judgment of the Court.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

At a Court of Claims held in the City of Washington on the 18th day of February, 1907, judgment in the above-entitled cause was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimant, Dennis W. Mullan, be and the same is hereby dismissed.

BY THE COURT.

26 VI.—*Application for and Allowance of Appeal.*

No. 22822.

DENNIS W. MULLAN
v.
UNITED STATES.

Request for Appeal.

On behalf of the claimant we respectfully request the allowance of an appeal to the Supreme Court of the United States from the judgment herein entered on February 18, 1907.

RALSTON & SIDDONS,
Attorneys of Record.

Filed in open Court April 8, 1907.

And it was thereupon ordered that the appeal be allowed as prayed for.

BY THE COURT.

27 Court of Claims.

No. 22822.

DENNIS W. MULLAN
vs.
UNITED STATES.

I, John Randolph, Assistant Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the judgment of the Court; of the application for, and allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of the Court of Claims this 15th day of April A. D., 1907.

[Seal Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

O. K.
F. W. B.

Endorsed on cover: File No. 20,713. Court of Claims. Term No. 311. Dennis W. Mullan, appellant, *vs.* The United States. Filed May 14th, 1907. File No. 20,713.